KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

FACSIMILE

(202) 955-9792

www.kelleydrye.com

NEW YORK, NY

TYSONS CORNER, VA

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

HONG KONG

AFFILIATE OFFICES

BANGKOK, THAILAND

JAKARTA, INDONESIA

MUMBAI, INDIA

TOKYO, JAPAN

DIRECT LINE: (202) 955-9890

EMAIL: sjoyce@kelleydrye.com

May 27, 2004

VIA ELECTRONIC FILING

Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Re: Notice of *ex parte* presentation, CC Docket No. 01-338

Dear Ms. Salas:

Today, Doug Nelson of KMC, Jim Falvey of Xspedius, Jonathan Lee of CompTel, Dick Metzger of Focal, Jonathan Windhausen of ALTS, and John Heitmann of Kelley Drye and Warren LLP on behalf of KMC, Xspedius, NuVox, SNiP LiNK and XO met with Bill Maher, Jeff Carlisle, Robert Tanner, and Jon Minkoff of the Wireline Competition Bureau, to discuss issues related to the *FNPRM* released in the above-captioned docket. A copy of the attached document was distributed during the meeting. In addition to discussing positions raised in the comments and reply comments, and the attached item which was distributed at the meeting, the participants also expressed concerns with respect to and disagreement with recent *ex partes* filed by Verizon (3/25/04) and BellSouth (4/27/04, 5/11/04) regarding the *FNPRM.*

In accordance with Rule 1.1206, this notification of oral *ex parte* presentation and the attached written *ex parte* presentation are submitted for inclusion in the record of the above-captioned docket.

Please do not hesitate to contact me with any questions or concerns regarding this matter.

Sincerely,

John J. Heitmann

Attachment

cc: Bill Maher
Jeff Carlisle
Robert Tanner
Jon Minkoff

KMC, NuVox, SNiP LiNK, Talk America, XO and Xspedius

Ex Parte Presentation re the 252(i) Pick-and-Choose FNPRM

December 11, 2003

CC Docket No. 01-338

The Existing Pick-and-Choose Rule Enjoys Overwhelming Industry Support, an Unambiguous Congressional Mandate, and the Supreme Court's Stamp of Approval – The Record Contains Solid Evidence of Its Success and None of Its Alleged Deficiencies

Overwhelming Support as an Essential Tool for Competitors

- Nearly 50 CLECs, and ILECs, including Sprint and the rural ILECs, came out in strong support of the FCC's existing rule
  - CLECs and NASUCA said it was an essential tool for market entry and leveling bargaining power and resource disparity
  - Nearly all parties expressed grave concern regarding the legal sustainability of the Commission's proposal – recognizing the weakness of the statutory interpretation proposed, many, such as BellSouth focused on forbearance arguments
- ILECs provided evidence that it is indeed widely used (*e.g.*, 150+ pick and choose agreements in BellSouth – more widely used than entire agreement opt-in; 120+ in SBC – despite the ubiquity of the x2A agreements)

No Evidence of Alleged "Cherry-Picking" Inhibiting Meaningful Marketplace Negotiations

- Notably brief ILEC comments offered no evidence of alleged "cherry-picking" abuses that prevent meaningful marketplace negotiations
  - SBC alleges one incident – the TX Commission apparently disagreed
- The current rule does not discourage negotiations – sluggish implementation and weak enforcement of the rules has helped the ILECs to maintain market power – it is their overwhelming market dominance that discourages negotiations
- ILECs negotiate when they want to and use pick-and-choose as an excuse when they don't want to
  - Negotiations have yielded meaningful compromises on interconnection requirements, reciprocal compensation payments, EEL conversions, ordering and provisioning, etc.
  - On most issues, ILECs negotiate only because they have to (competition is not yet robust enough to compel them to negotiate willingly and embrace the role of wholesaler)
- BOC comments demonstrate that they don't need the relief the Commission is contemplating
  - Promises from these companies of more meaningful negotiations in the future are worthless
  - Not willing to give anything in exchange for the relief proposed

KMC, NuVox, SNiP LiNK, Talk America, XO and Xspedius

Ex Parte Presentation re the 252(i) Pick-and-Choose FNPRM

December 11, 2003

CC Docket No. 01-338

Why Throw Out One of the Commission's Few 1996 Act Implementation Wins?

- The express language of section 252(i) prohibits the FCC from forcing CLECs to accept agreements in their entirety
  - Supreme Court upheld as perhaps the only proper reading of statute
  - Unambiguous text: "any"
  - Congressional history supporting the fact that "any" provision does not mean "all" provisions
- The SGAT proposal is seen as unworkable by all sides of the industry – it is a bandage that nobody wants for an injury the FCC cannot lawfully inflict
  - BOCs/USTA probably will appeal, if the FCC goes this route – so why bother?
  - SGATs were never intended to replace negotiations and 252(i)
  - SGATs are not negotiated and do not reflect competitors' entry needs
- Tossing out the pick-and-choose rule in favor of a tortured interpretation of the statute (plus revamped super-SGATs) will only lead to more litigation and further regulatory instability
- The test for forbearance has not been met

There Are Steps the Commission Should Take to Improve the Effectiveness of its Existing Rule

- Lending additional clarity to the pick-and-choose rule will further meaningful marketplace negotiations
  - The "legitimately related" nature of terms should be obvious or plainly stated
  - ILECs must accept opt-ins without demanding amendments
  - ILECs must effectuate opt-in requests within 15 days
  - CLECs should be able to short-circuit ILEC bad faith tactics by filing opt-ins directly with a state commission
- California Commission has had success with similar rules